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No. 83-1145
IN THE

Supreme Court of the United States

October Term, 1983

ROBERT SINGER,

Petitioner,

vs.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE, and COUNTY OF ORANGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

ARGUMENT.

The Respondents Have Failed to Address the Questions Raised by the Petitioner Herein.

Respondents ignore the four questions presented in the Petition for Certiorari (hereinafter "Petition") and raise three questions of their own by which they attempt to obviate the issues raised by Petitioner. By this device Respondents avoid the issues of substantive law and dwell on procedural questions in a greatly reduced context.

The Respondents Misstate the Development of This Case Since There Were No State Court Adjudications.

Respondents, in their "Brief in Opposition" (hereinafter "Brief") state:

> After unsuccessfully pursuing this matter in the California State Trial Court, [fn omitted] Petitioner filed

the instant action in the United States District Court for the Central District of California . . ." (Brief, p. 2).

In a footnote Respondents attempt to lead this Court to the conclusion that the federal issues now before this Court were litigated in the California Superior Court. Respondents again attempt to support this conclusion by claiming that the Doctrine of Res Judicata would bar the instant litigation should abstention be granted. (Brief, p. 13).

The State Court litigation set forth in footnote 3 of the Brief in Opposition never litigated the issues before this Court, the Court of Appeal, or the District Court. It is incredible that a member of the Bar could conclude, as here, that Petitioner unsuccessfully pursued this matter in a "California Trial Court" (Brief, p. 2) much less claim that the State Court acted in such a manner as to cause this action to be "barred by the Doctrine of Res Judicata." (Brief, p. 13).

The litigation set forth in footnote 3 of the Brief in Opposition was originally filed on September 17, 1980 seeking a Writ of Mandate to compel Respondents to comply with California Government Code §§3500 *et seq.* and related state laws.[1] The litigation was not brought pursuant to Title 42, United States Code §1983 and did not address federal constitutional questions. Counsel for Respondents herein successfully opposed a Motion by the Petitioner herein to amend the State Court Petition to include the federal claims.[2]

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[1]The "Association of Orange County Deputy Sheriffs" is an employee organization filling the role of labor union and represents all Orange County Deputy Sheriffs and Orange County District Attorney investigators pursuant to California Government Code §§3500 *et seq.*

[2]With the exception of this litigation as commenced in the United States District Court for the Central District of California no court has determined the federal rights of the Petitioner herein.

The Ninth Circuit Did Not Consider, nor Did the Parties Argue the Effect of Depublication Albeit Petitioner Requested Such Briefing Be Allowed.

Respondents also claim that the value to be given an opinion subsequently ordered not to be published by the California Supreme Court was "orally argued before the Ninth Circuit and subsequently addressed in letters to the Ninth Circuit panel when the California Supreme Court later ordered the case depublished." (Brief, pp. 3-4).

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") never addressed, at oral argument or elsewhere, the effect of the California Supreme Court depublishing the opinion in *Monzingo v. City of Garden Grove*, 190 Cal.Rptr. 750 (1983).[3] At the time of oral arguments the opinion was "published." The only comment on the unpublished status, as subsequently ordered by the California Supreme Court, came in letters to the Clerk of the Ninth Circuit. Despite the claim of Respondents the letters do not "address" the issue.[4]

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[3]The opinion is still published at 190 Cal.Rptr. 750 (1983) albeit not in 141 Cal.App.3d 830.

[4]The letters stated:

Phillip B. Winberry, Clerk
United States Court of Appeals
for the Ninth Circuit
1699 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90010

Re: *Association of Orange County Deputy Sheriffs, et al., v. Brad Gates, et al.*; 82-5686

Dear Mr. Winberry:

At oral arguments on May 3, 1983, before Circuit Judges Richard Chambers, Anthony M. Kennedy, and Procter Hug, Jr., the California case of *Monzingo v. City of Garden Grove, et al* (4 Civil 28354) was cited and argued in light of the above-referenced case. At that time, the California Court of Appeal had ordered this case to be published.

The California Supreme Court, by order dated May 25, 1983, has ordered that this opinion *not* be published pursuant to Rule 976(c)(2) of the California Rules of Court and therefore this opinion which has

(footnote continued on following page)

The California Supreme Court Never Determined That the Decision of *Monzingo v. City of Garden Grove* Lacked Value or Legal Reasoning.

Respondents claim the California Supreme Court determined the *Monzingo* decision was of such little value and

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been de-published may not be cited or relied upon by any court or any party in any proceedings pursuant to Rule 977(a) of the California Rules of Court.

We are attaching four copies of this order of the California Supreme Court and ask that you transmit this order, along with a copy of this letter, to the panel noted above.

By copy of this letter we have informed counsel for Appellants of these facts.

Very truly yours,
ADRIAN KUYPER, COUNTY COUNSEL
By John W. Anderson, Assistant
for Edward N. Duran, Deputy

END:dh
Atts.
cc: Gregory G. Petersen

Mr. Phillip B. Winberry, Clerk
United States Court of Appeals
for the 9th Circuit
P.O. Box 547
San Francisco, CA 94101

Re: *Association of Orange County Deputy Sheriffs, et al., v. Brad Gates, et al.*, 82-5686

Dear Mr. Winberry:

I have received a letter directed to you from the offices of the County Counsel of the County of Orange with regard to the aforementioned litigation. Opposing counsel asks that you direct this letter and the information contained therein to the panel which heard the matter and it is the purpose of this letter that that not be done or alternatively, if done, that the panel be informed that counsel for the appellants does not concur with the legal conclusions set forth in the communique and that the matter, in the opinion of appellant's counsel, should be subject to briefing if it is to be considered by the panel.

Thank you very much for your cooperation in this matter.

Sincerely,
GREGORY G. PETERSEN
AND ASSOCIATES
by Gregory G. Petersen
Attorney at Law.

GGP/pl
cc: Edward N. Duran, Deputy County Counsel

legal reasoning that it should be depublished.[5] The most that the Respondents can claim is that the opinion did not meet the criterion for publication as set forth in the footnotes to the California Rules of Court, Rule 975(b).[6] The criterion for publication "calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression, where a legal rule or principle is applied to a substantially new factual situation."

As shown by the *Monzingo* decision, the California Court of Appeals relied on established precedents and applied them to a straight forward fact situation, *i.e.*, "Certainly, any active or honorably retired city police officer under these provisions have a legitimate claim of entitlement to the privilege (See *Board of Regents v. Roth* (1972) 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548)." *Monzingo*, Petition, Appendix "C", p. 57.

Petitioner's position is the same as that taken by the California Court of Appeal which is not reflected in any other opinion in this matter and this Court should examine the issues presented as the final arbiter of the United States Constitution. Respondents' suggestion that "This Court should not entertain reargument and rehashment of the same trite arguments already put forth by Petitioner" (Brief, p. 4) fails to examine the overall effect of the decision at bar. Petitioner respectfully submits that an examination of the

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[5]The "members" of the California Supreme Court are the Chief Justice and Associate Justices of the Supreme Court of California. These Justices, according to Respondents, have stated that the Justices of the Court of Appeal entered a decision that was legally unsound. This has not occurred.

[6]California Rules of Court, Rule 975(b) is set forth as Appendix H to the Petition for Certiorari.

record will show that the respondents' position is wholly unsupported.

The Local Rules of Court for the Ninth Circuit and the California Rules of Court Effect the Respective Courts but Not Each Other.

Respondents fail to go beyond the superficial claim that an unpublished opinion is not "precedent." As noted in *Factors Etc., Inc. v. Pro Acts, Inc.* (2nd Cir. 1981) 652 F.2d 278, 282-283, "a Federal Court's decision on state law cannot be corrected, for the benefit of the litigants in the particular case, by the state's authoritative tribunal." Here the Respondents admitted by their Answer that Honorably retired peace officers are entitled to the benefits of Penal Code §§12027 and 12031. The California Court of Appeal confirmed that a protected property interest is vested by Penal Code §§12027 and 12031. The decision is published at this time at 190 Cal.Rptr. 750 (1983); albeit the unofficial case reports. The difficulty is that the Ninth Circuit, at the time of oral argument, was faced with an officially published decision. While this decision was subsequently unpublished by the California Supreme Court, it was not disturbed. A federal court has now decided squarely against the decision of the intermediate appellate court while being "directly" aware of that Court's "predisposition" in interpreting a state statute. *cf. Memphis Development Foundation v. Factors, Inc.* (6th Cir. 1980) 616 F.2d 956, 958.

Respondents' Argument of Improper Conduct Is Wholly Inappropriate.

In their brief Respondents attempt to accuse Petitioner's counsel of unethical conduct in order to oppose the Petition for Certiorari. This argument is no more and no less another attempt at obfuscation. In the trial court the Respondents cited two unpublished California Superior Court trial de-

cisions. California Trial Court opinions are never published.[7]

Petitioner submits that the Respondents' argument is no more than a Red Herring designed to again obfuscate the substantive legal issue. The simple matter of fact is that the opinion *was* published when presented to the Ninth Circuit and its subsequent depublication, without modification, does not relieve the Ninth Circuit of its obligation to ascertain the predisposition, directly or indirectly, of the California Courts on these state statutes.[8]

Respondents Claim That the Doctrine of Comity Does Not Apply and Also Fails to Consider Any Precedents on Abstention.

The Respondents claim that comity and abstention need not apply here. Their rationale again focuses on "unpublished" decisions being without precedent. The focus of Comity and Abstention is not which court, state or federal, decides the issue first. Respondents were satisfied when they believed the weight of unpublished state trial court opinions favored their position (if in fact they did); but now complain that the federal court is wholly free to disregard a State Court of Appeal interpretation of its own State's statute. This is pure opportunistic advocacy and fails wholly to examine the issues presented. California Peace Officers know of the *Monzingo* decision and the *Gates* decision. The conflict between the two decisions is inexplicable and certainly leaves California Peace Officers in a quandry as to how two intermediate Courts of Appeal can come to wholly opposite conclusions on the same statutes with reliance on the same cases. While Petitioner clearly believes that the statute was

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[7]The appellate decision of the California Court of Appeal was published at the time or oral argument in the Ninth Circuit.

[8]Petition, pp. 25-28.

clear and appropriate for federal relief this is no longer so since the state and federal appellate decisions "has at least raised such doubt as to the applicable . . . law" that abstention is required. *Cf. Huddleston v. Dwyer* (1944) 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246; *Davis v. Mann* (1964) 377 U.S. 678, 690, 84 S.Ct. 1441, 12 L.Ed.2d 609; *Hillsborough Township v. Cromwell* (1946) 326 U.S. 620, 628, 66 S.Ct. 445, 90 L.Ed. 358.

Conclusion.

For the reasons set forth in the Petition the Court should determine the questions raised by the Petitioner. The consequence of the decision which is before this Court is, but for this Court's action, to deny all honorably retired California Peace Officers a means of livelihood and a vested property interest.

Dated: March 16, 1984.

Respectfully submitted,

PETERSEN & FERGUSON,
A Law Corporation,
By GREGORY G. PETERSEN,
Attorneys for Petitioner.